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No. 72-567

IN THE

Supreme Court of the United States

OCTOBER TERM OF 1973

HOLLAND-AMERICA LINE,

Petitioner,

-v-

FOREIGN STUDY LEAGUE,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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No. 72-587

IN THE

Supreme Court of the United States

OCTOBER TERM OF 1972

HOLLAND-AMERICA LINE,

Petitioner,

-v.-

FOREIGN STUDY LEAGUE,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of Utah is reported at 497 P.2d 244 (1972), but not yet officially reported; the Order of the District Court of the Third Judicial District of Utah was not officially reported. The opinion of the Utah Supreme Court is set forth in Appendix A hereto.

JURISDICTION

Petitioner alleges jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the Utah Supreme Court correctly applied the due process standard as explained by this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), *McGee v. International Life Insurance Company*, 355 U.S. 220 (1957), and *Hanson v. Denckla*, 357 U.S. 235 (1958), in finding petitioner subject to the jurisdiction of the Utah Courts pursuant to the provisions of the Utah Long-Arm Statute, Utah Code Ann. § 78-27-22, *et seq.* (Pocket Supp. 1971). The Utah Long-Arm Statute is set forth in Appendix C hereto.

CONSTITUTION AND STATUTES INVOLVED

The relevant provision of the United States Constitution in this suit is Amendment XIV, Section 1. Relevant statutory provisions are the Utah Long-Arm Statute, Laws of Utah, 1969, ch. 246, secs. 1-7, Utah Code Ann. § 78-27-22 *et seq.* (Pocket Supp. 1971). These provisions are set forth in Appendix B and C respectively.

STATEMENT OF THE CASE

The petitioner, Holland-America Line (hereinafter referred to as "HAL"), is a Netherlands steamship company engaged in furnishing passage and cargo services on various ocean trade routes, principally on the North Atlantic Ocean. The respondent, Foreign Study League (hereinafter referred to as "FSL"), is incorporated in Utah and charters overseas passage as part of its foreign study plan. During 1969, respondent FSL engaged in negotiations with petitioner HAL to charter petitioner's passenger vessel, the S.S. Ryndam, for the summer of 1970. A dispute arose as to whether such negotiations had resulted in an enforceable contract and if so, whether FSL was in breach thereof. FSL commenced suit for a declaratory judgment in the District Court of

the Third Judicial District of Utah on April 10, 1970. A copy of the summons and complaint was mailed to HAL in Rotterdam, the Netherlands, another copy was delivered to HAL's New York office by a Deputy Sheriff of New York City. On April 17, 1970, HAL commenced a suit in the United States District Court for the Southern District of New York for breach of contract which arises out of the identical facts as are involved in this suit.

HAL moved to dismiss the complaint filed by FSL in the Utah District Court for the Third Judicial District of Utah for lack of *in personam* jurisdiction. The District Court granted HAL's motion to quash service of summons, primarily on the ground that HAL's jurisdictional contacts with Utah were insufficient to satisfy the requirements of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *McGee v. International Life Insurance Company*, 355 U.S. 220 (1957). The Supreme Court of Utah reversed the District Court's decision. (Appendix A)

The bases for jurisdiction of the petitioner as dealt with by the lower courts were:

1. HAL signed "Sub-Agency Appointment Agreements" which authorized 18 or 19 travel agents in Utah to display HAL's literature, sell bookings on HAL's behalf, receive commission for accepted bookings, and escrow the fares. (A-4, 6, 7)*

2. Between March 31, 1969 and January 17, 1970, Johannes Tuinman, Jan Boeren and John Vos, HAL employees, made business visits to respondent FSL in Salt Lake City. In March 1969 and in January 1970, Mr. Tuinman, general sales manager for HAL, met with Mr. Touw, President of FSL, and FSL's attorney with respect to the contract to employ the ship Ryndam,

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* Page numbers refer to pages of the appendix hereto.

which is he subject of this suit and the suit filed by HAL in the New York District Court. (A-5)

3. In 1968, 1969 and 1970 there was correspondence, telegrams and telephone calls between FSL in Utah and HAL in New York and Rotterdam with respect to chartering the Ryndam. HAL sent an agreement for employment of the Ryndam to FSL in Salt Lake City and by telegraphic and telephonic communications HAL insisted that a contract had been consummated and a representative of HAL came to Utah to confer with FSL concerning the dispute or misunderstanding as to the contract which is the subject of this law suit. (A-5, 7)

On the basis of these uncontradicted statements, the Utah Supreme Court found that within the letter and spirit of *International Shoe,* the leading Utah case, *Hill v. Zale,* 25 Utah 2d 357, 482 P.2d 332 (1971), and the Utah Long-Arm Statute there was a "doing of business" by HAL in Utah and that these actions justified the local courts exercising jurisdiction over HAL without avoiding the due process concept. (A-5, 6) The Petition seeks review of this judgment of the Utah Supreme Court, filed May 15, 1972, reversing the Judgment and Order of the District Court of the Third Judicial District of Utah, based upon provisions of Utah's Long-Arm Statute.

REASONS FOR DENYING THE WRIT

1. THE UTAH SUPREME COURT HAS INTERPRETED THE "TRANSACTING OF ANY BUSINESS" CONCEPT OF THE UTAH LONG-ARM STATUTE AND THE "DOING BUSINESS" CONCEPT OF *INTERNATIONAL SHOE CO. V. WASHINGTON,* 326 U.S. 310 (1945), TO BE SYNONYMOUS AND THIS INTERPRETATION OF STATE LAW IS NOT REVIEWABLE BY THIS COURT.

Under Utah law, Utah courts have *in personam* jurisdiction over a nonresident where the nonresident is found to have "certain significant minimal contacts with this state" including "transacting any business" within the state. Utah Code Ann. §§ 78-27-22, 24(1). Petitioner asks as the second of its questions presented for review:

> Whether the Court below erred in failing to distinguish between the two concepts of "doing business" and a "transaction of business" from which an actionable claim could arise, under Utah's "long-arm" statute . . . . (Petition at 2)

The Utah Supreme Court held that these two concepts were synonymous. Petitioner urges that the Utah Supreme Court erred in interpreting the Utah Long-Arm Statute to include the concept of "doing business" within the meaning of "transacting of any business" as provided by the Utah Statute. This interpretation is a question of state law.

The Utah Supreme Court is the final arbiter of the interpretation of Utah statutes. Under the opinion of the United States Supreme Court in *Murdock v. City of Memphis,* 87 U.S. 590 (1874), this Court is without power to re-examine judgments on the question of state law. *See also, Skelly Oil Co. v. Phillips Petroleum Co.,* 399 U.S. 667, 674 (1950), *Williams v. Kaiser,* 323 U.S. 471, (1945), and *Missouri, ex rel. Wabash Ry. Co. v. Public Service Commission,* 273 U.S. 126 (1927).

The Utah Supreme Court found that the Utah District Court had *in personam* jurisdiction over petitioner HAL pursuant to a Utah statute, the validity of which is not brought in question by the Petition for a Writ of Certiorari. This determination by the Court below was made on the basis of the interpretation of a valid state statute. The Court below ruled that it is the purpose and intent of Utah's Long-Arm Statute "to assert jurisdiction over

non-resident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment." The Utah Supreme Court interpreted this purpose to mean that the extent of Utah's Long-Arm Statute is coterminous with, not in excess of, the due process standard set down by this Court.

Petitioner, admitting that the Utah Supreme Court interpreted the limits of Utah's Long-Arm Statute and the "doing business" requirement of *International Shoe* to be synonymous, argues that in fact the two concepts are not synonymous and that this interpretation is not only incorrect but a denial of due process.

> It [the Utah Supreme Court] concluded that jurisdiction arising under Utah's "Long-Arm" statute, and that based upon "doing business", were "synonymous". As a result, the Court created a new concept, in which jurisdiction would appear to exist over a nonresident where there are insufficient contacts with the forum state (none of which give rise to the cause of action) to constitute "doing business", merely because a "long-arm" statute exists. (Petition at 6)

Petitioner attempts to argue that by interpreting as synonymous the "doing business" concept of *International Shoe* and the "certain significant minimal contacts" concept of the Utah Statute, Utah Code Ann. § 78-27-22, the Utah Supreme Court has rendered the "territorial limits of state jurisdiction to be virtually inconsequential." This simply is not what the Utah Supreme Court said.

The Utah Court did not extend the scope of the Utah Long-Arm Statute and its opinion does not suggest "the territorial limits of state jurisdiction to be virtually inconsequential." What the Court did was affirm that the Utah Long-Arm Statute should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment. (A-2)

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The Utah Supreme Court found, after examining all the contacts which HAL had with Utah as contained in the record, including furthering its business interests through sub-agents and negotiating the contract which is the subject of the suit in the court below with FSL, petitioner HAL subject to the jurisdiction of the Utah District Court on the ground that within the meaning of *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), HAL had sufficient purposeful "minimum contacts" with the state of Utah to satisfy the constitutional right to due process of law and, therefore, sufficient to satisfy the "transacting any business" requirement of the Utah Long-Arm Statute, Utah Code Ann. § 78-27-22 *et seq.* (1969).

The only question, therefore, presented by HAL's petition is whether the Utah Supreme Court properly applied the due process standard of *International Shoe, McGee* and *Denckla* and not whether the Court below has "extended the reach of Utah's 'long-arm' statute beyond its permissible limits." (Petition at 9)

2. THE UTAH SUPREME COURT HAS CORRECTLY FOUND THAT HOLLAND-AMERICA LINE'S CONTACTS WERE SUFFICIENT TO MEET THE MINIMAL STANDARDS REQUIRED BY THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION, AMEND. XIV § 1, AND THAT HOLLAND-AMERICA LINE "DID BUSINESS IN UTAH UNDER THE LETTER AND SPIRIT" OF *INTERNATIONAL SHOE CO. V. WASHINGTON,* 326 U.S. 310 (1945).

The due process standard, as laid down by this Court in *International Shoe v. Washington,* 326 U.S. 310 (1945) and *McGee v. International Life Insurance Co.,* 355 U.S. 220 (1957) as defined by *Hanson v. Denckla,* 357 U.S. 235 (1958) requires that to warrant state court jurisdiction over a nonresident, there be certain purposeful "minimum contacts" with that state:

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> [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *Hanson v. Denckla,* 357 U.S. 235, 253 (1958).

Thus, it is necessary that the state court determine that the non-resident defendant has enjoyed the benefits and protections of the state and further that these activities were purposeful. The Court below properly considered these factors and concluded that HAL was subjct to the jurisdiction of the Utah courts.

The record below shows that HAL purposefully engaged in a "bundle" of contacts beginning at least in 1968 and continuing until 1970, within the State of Utah, evidencing a desire to invoke the benefits and protections of Utah's laws, which in the aggregate amounted to "doing business in the statutory and constitutional connotations of that phrase." A number of these contacts were outlined in the majority's opinion below. For example, HAL signed written agency contracts with 18 or 19 Utah travel agents containing comprehensive terms relating to the sale of tickets and escrowing of funds for HAL. The agreements were executed by HAL which relied on their validity in the State of Utah and their enforceability in the courts of that state. (A 4-6) The Utah Supreme Court considered the following additional contacts: during 1968-69 HAL's relations with the Utah based FSL resulted in the realization by HAL of roughly $600,000 in gross sales (A-4); charter of the ship Ryndam, which is the subject of the contract in the suit below, was discussed at considerable length at a meeting held in Utah (A-7); negotiations of this contract took place, at least in part, in Utah (A-5); the contract was mailed by HAL to FSL in Utah for signing (A-7); FSL mailed HAL $160,000 from Utah on account of the proposed contract (A-7); and the contract was rejected by FSL

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in a meeting with representatives of HAL in Utah (A-8). These contacts furnish more than adequate support for the opinion of the Court below that HAL had purposefully engaged in significant minimum contacts sufficient to incur obligations to citizens of the State of Utah and establish jurisdiction of the courts of Utah over HAL.

This Court in *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), upheld the jurisdiction of a California court where the only contacts with that state were the act of mailing a reinsurance certificate to the plaintiff in California, and the plaintiff accepting the offer and paying the premiums by mail from California. All of the contacts which were necessary to support the jurisdiction of the California court in *McGee* exist in the present case, together with many others. HAL sent the contract to FSL in Utah, FSL paid part of the contract price by mail from Utah, and HAL asserts that FSL accepted the contract in Utah.

Under "the letter and spirit of *International Shoe*," HAL had established sufficient purposeful minimum contacts with the State of Utah to meet the standard required by the due process clause.

3. THE PETITION FOR CERTIORARI DOES NOT PRESENT AN IMPORTANT FEDERAL QUESTION AND THE DECISION BELOW TURNS ON NARROW FACTUAL CONSIDERATIONS, LIMITED TO THE PRESENT CASE.

The question presented by HAL's Petition for Certiorari is whether the contacts of HAL with the State of Utah are sufficient to establish a "doing of business" in Utah within the limits of the due process standard as set down by this court in *International Shoe, McGee,* and *Denckla,* and thereby establish jurisdic-

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tion of the Utah Court pursuant to the Utah Long-Arm Statute. Petitioner HAL erroneously attempts to mislead this Court into believing that there is a significant federal question presented by the petition, to wit:

> By erroneously construing a state statute, and extending the reach of Utah's "long-arm" statute beyond its permissible limits the Court below has violated the petitioner's constitutional right to due process of law. (Petition at 9)

The Utah Supreme Court has not attempted to extend the limits of its Long-Arm Statute beyond the permissible standard of the due process clause. The Utah Supreme Court in its opinion below refutes this contention. The language of the Utah Long-Arm Statute and of the Utah Supreme Court reveal that the extent of jurisdiction allowed by the Utah Long-Arm Statute and that permitted by the due process clause of the fourteenth amendment to the United States Constitution are coterminous. The Court below stated that:

> The rule leading to a conclusion that such nonresident constitutionally must subject himself or itself to the jurisdiction of our courts, is one of reason, — which is only an alternate way of saying that the minimum guarantees of due process must be afforded, else our courts are without authority to bind or grant relief to the nonresident. This concept is embraced within the prefatory language of our so-called Long Arm Statute which says the act "should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution," — to provide "an effective means of redress against nonresident persons, who through certain *significant minimal contacts* with this state, incur obligations to citizens entitled to the state's protection." It appears almost obvious that this language was prompted by *International Shoe v. Washington*, which used the word "minimum" contacts rather than "mini-

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> mal" contacts employed in our act, — which language seems to be synonymous, but motivated by our use of "minimal" in our case of *Hill v. Zale*.

Thus, in its opinion below and also in *Hill v. Zale*, 25 Utah 375, 482 P.2d 332 (1971), the Utah Supreme Court defined the "transacting of any business" of the Utah Long-Arm Statute and the "minimum contacts" of *International Shoe* to be synonymous. (Petition at 6) This interpretation of state law is binding on this Court.

This Court has already stated the standard required by the due process clause of the fourteenth amendment to the Federal Constitution for a state court to exert jurisdiction over a nonresident defendant in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), and *Hanson v. Denckla*, 257 U.S. 235 (1958). The question of whether a nonresident is doing business within a state within the meaning of that state's long-arm statute is strictly a factual one. Each case, therefore, must be determined on its own peculiar and significant facts. The question presented by HAL's Petition turns on whether a bundle of factual contacts amounts to "doing business". In light of the standard already established by this Court, a decision under the peculiar facts of this case will necessarily relate only to the factual situation presented by HAL's Petition and will not enlarge on any federal question of substance that has not already been decided by the Court.

CONCLUSION

This Court has in numerous decisions laid down the due process standard which must be met by state courts in applying their, so-called, "long-arm" statutes before jurisdiction may be

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had of nonresident defendants. Consideration by this Court of the establishment of jurisdiction pursuant to a particular long-arm statute involves a factual consideration limited to that particular suit and not of broad applicability. As long as states adhere to the rules set down by this Court in *International Shoe, McGee* and the *Hanson* cases, the state long-arm statutes will be assured of the degree of uniformity required by the United States Constitution.

This due process standard was properly applied by the Utah Supreme Court and for this reason, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Arthur A. Allen, Jr., Attorney for Respondent Foreign Study League, do hereby certify that on this, the ..... day of November, 1972, a copy of the foregoing Brief in Opposition to the Petition for a Writ of Certiorari has been served on the following:

Frank L. Wiswall, Jr.
Office and Post Office address
25 Broadway
New York, New York 10004

Attorney of Record for the Petitioner, by mailing the same to him through the United States Mail, postage pre-paid.

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APPENDIX A

IN THE SUPREME COURT OF UTAH

No. 12445

Foreign Study League, a Utah corporation,
Plaintiff and Appellant,

v.

Holland-America Line,
Defendant and Respondent.

Supreme Court of Utah

May 15, 1972

Henriod Justice:

Appeal from an order quashing service of process in an action instituted under the Utah Declaratory Judgment Act (Title 78-33, Utah Code Annotated 1953). Reversed and remanded for further proceedings consonant with this decision with costs to plaintiff.

The question here, that of whether a nonresident is doing business in the state is strictly a factual one, and each case, therefore, must be determined on its own peculiar and significant facts[1] to determine if the local forum has jurisdiction to try and adjudge the claims or obligations of one domiciled elsewhere. The rule leading to a conclusion that such nonresident consti-

[1] McGriff v. Chas. Antell, 123 Utah 166, 256 P.2d 703 (1953).

tutionally must subject himself or itself to the jurisdiction of our courts, is one of reason, — which is only an alternate way of saying that the minimum guarantees of due process must be afforded, else our courts are without authority to bind or grant relief to the nonresident. This concept is embraced within the prefatory language of our so-called Long Arm Statute[2] which says the act "should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution," — to provide "an effective means of redress against nonresident persons, who through certain *significant minimal contacts* with this state, incur obligations to citizens entitled to the state's protecion." It appears almost obvious that this language was prompted by International Shoe v. Washington,[3] which used the word "minimum" contacts rather than "minimal" contacts employed in our act, — which language seems to be synonymous, but motivated by our use of "minimal" in our case of Hill v. Zale.[4]

Since these cases are strictly factual and dispositive by the application of case and statutory law to the fact situation presented in the instant case, there seems to be merit in recalling the facts and conclusions in the Shoe and Zale cases (upon which our act seems to be founded), in some kind of qualitative and/or quantitative analytical comparison with those in the instant case for a solution of the problem by this tribunal.

In the Shoe case, — one involving contributions by employers to a workmen's compensation fund, the Shoe Company, domiciled in St. Louis, had no place of business or office in Wash-

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[2] Title 78-27-22, Utah Code Annotated 1953 (Laws of Utah 1969, ch. 246, sec. 1; Vol. 9, 1971 Pocket Supplement, p. 44).

[3] 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

[4] 25 Utah 2d 357, 482 P.2d 332 (1971).

ington State, no contracts of sale there, no stock of merchandise there, but employed resident salesmen there. They worked on commissions, carried samples and occasionally rented sample rooms paid for from St. Louis. They sent their orders to St. Louis for acceptance or rejection, and if accepted the shoes were shipped from the Missouri city to buyers in Washington. The salesmen had no authority to enter into contracts or make collections. The United States Supreme Court said that Constitution-wise this was doing business in Washington warranting the invocation of jurisdiction there to determine controversies between Washingtonians buying footwear therefrom lasts abroad.

In the Zale case plaintiff Hill, who claimed wages earned in Alaska as employee of Zale, a Texas corporation, sought recovery in Utah, asserting that Zale was "doing business" in Utah. Zale was a jewelry outfit for whom Hill had worked in Utah. It had stores in a number of states, — several of which in Utah were subsidiarized and subsidized by separate corporations officered by identical gentlemen. The advertising, collections and auditing functions funneled in and out of the subsidiaries and their defendant parent, that paid the salaries of all employees. Ostensibly, Zale of Texas, was phantom in Utah. Nonetheless, we had little or no difficulty in holding that it was mundane enough to have used Utah in such fashion as to conclude that the hand it extended here for profit equally was capable of effectively accepting service of process.

Now, as to the facts in our instant case: It is believed and submitted that the evidence adduced under the discovery process, substantially and without serious contradiction, accurately may be abstracted thus:

Plaintiff is a Utah corporation which, among other things, charters ships for educational purposes, visiting foreign lands. Defendant on its ship accommodates such travel for a fixed fee.

It has offices principally in Rotterdam, but also in New York, San Francisco, Los Angeles and other likely ports of call. Most of the evidence in and out of the inordinately protracted transcript here, flows from the frank responses of two top officials of the Holland-America sail and sales maritime operations. The interpretations of their frankness by the litigants here understandably are poles apart.

Tuinman, a top and authoritative representative of defendant says: That he resides in New York, is general sales manager for defendant; that he markets defendant's passenger service in the United States, amounting to about forty million dollars per year, including charter service, in which area the plaintiff was by far its chief customer in 1968-69, and out of which a roughly estimated gross of $600,000 was realized from the Utah-based corporation's relations with defendant, — and in which sales effort he had a close connection; that his company's operations were fostered by field agents, also through about 18 or 19 travel agents in Utah who were authorized through defendant's front institution Trans-Atlantic Passenger Conference, by written agency contracts, ratified by, subscribed to and authorized by defendant, to display in Utah the defendant's literature, "sell bookings" on its behalf, and receive commissions for accepted bookings; that defendant's representatives call on them personally (in Utah), encourage them to sell defendant's space on the ship; that defendant has field agents that do about the same thing; that Mr. Tuinman knew Mr. Touw who used to work for the Holland Company, but now for plaintiff, who was responsible for the first college cruise contract between plaintiff and defendant; that Mr. Tuinman, because of his friendship for Touw, made combined social *and* business calls on the latter in Utah; that he called in March 1969 and in January 1970, meeting with Touw and plaintiff's attorney with respect to a contract to employ a ship for a

foreign trip; that one trip for a college was completed through plaintiff in 1969; that talks took place in Utah, New York and Rotterdam; that business was always discussed on such occasions; that in 1968 and 1969, with respect to the ship Ryndam, plaintiff was defendant's principal customer; that there were correspondence, telegrams and telephone calls with respect to chartering the Ryndam, between local authorities for plaintiff and those of defendant; that he sent out an agreement for employment of the Ryndam in 1970; that it was not signed by plaintiffs, — but that a telegraphic and phonic communication, Tuinman insisted that a contract had been consummated; that he came to Utah to confer with plaintiff's officers re a dispute or misunderstanding as to the contract for 1970, — at plaintiff's request, so he says: that he was in Salt Lake a couple of days and another representative stayed longer.

Although these uncontradicted statements on the part of one of defendant's top officials seem rather persuasive in concluding that the defendant did business here under the letter and spirit of the Shoe case, the Zale case, and our Long Arm Statute, the following facts also should lend weight to a conclusion that there was a "doing business" in Utah under the act that justified the local court's exercising jurisdiction without aborting the due process concept.

About two weeks *after* plaintiff filed this suit in Utah, defendant filed a suit in New York to collect damages for a breach of a contract executed by plaintiff, — which plaintiff here asserts to be unenforceable for one reason or another. It is difficult to understand how defendant can take the position that there *is* a contract, that under the facts recited above seem to have some basis for a conclusion that there were business dealings in Utah, but that everything, including the charter, profit, execution of the contract, etc.. was accomplished outside of Utah. At any rate,

comparing this case with the Shoe and Zale cases, we think the trial court erred, — particularly when its decision was bottomed at least on a statute[5] not cited in the brief and apparently not relied upon by either party as a matter for appeal here.

The record further reflects that Holland signed "Sub-Agency Appointment Agreements" with local travel agents wherein the agents agreed to comply with the company's instructions and the regulations of the Steamship Conference, of which defendant was a member, and in which comprehensive terms and conditions were incorporated relating to the sale of tickets, escrowing fares, etc., largely as testified to by Holland's Mr. Tuinman. It is conceded that each travel agent is not an exclusive agent for the steamship line and there is some kind of merit to a contention that there must be more contacts than just sales and sales promotions within the state by independent non-exclusive sales representatives, to constitute doing business. The contention would seem to beg the question, however, since it is based on the assumption that such sales and promotion are the *only* contacts in the state, — but in the instant case and in the Shoe case and in the Zale case the "more contacts" *were* extant. These last mentioned contacts cannot be ignored, and the written agency contracts mentioned using the term "agent" time and again, and containing elements of control at least when sales were accomplished, making such "agents" trustees for defendant and keepers of the faith for the latter, certainly do not detract from the ultimate conclusion that they, supportive of other facts, are part and parcel of a bundle of facs which in the aggregate are not misnomered if called "doing business" in the statutory and constitutional connotations of that phrase.

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[5] Title 16-10-102 (Laws of Utah 1963, ch. 19, sec. 8; Vol. 2, 1971 Pocket Supp., p. 263).

The record reflects that after considerable talk at a March 1969 meeting in Utah where minutes were taken, with plaintiff's counsel present, concerning a charter party for the ship Ryndam in 1970, after one had been completed in 1969, and after considerable telephonic and telegraph communications between the parties, — plaintiff in Utah and defendant in New York, — defendant, in November 1969 sent a lengthy and detailed contract to plaintiff in Salt Lake City for signature. The record is not too clear as to why it was not signed, except as reflected in the complaint, but a $160,000 check was sent to defendant in connection with the negotiations for the 1970 charter party. The Utah meetings were characterized and emphasized in defendant's brief as being strictly social and sort of in between stops. Such characterization does not reconcile itself as an absolute, with the frank concessions of Mr. Tuinman that the meetings were social *and* business meetings, and that business was discussed at all of them, nor with the fact that after the proffered contract was forwarded to plaintiff, but rejected without signature, Mr. Tuinman came to Salt Lake in January 1970 to discuss the differences.

We think that under the International Shoe case and the Zale case, the order quashing service of process was in error, and the case remanded for further proceedings, — and that there is no useful purpose in discussing any of the other authorities cited by the parties.

CALLISTER, *C.J.*, and TUCKETT, *J.*, concur.

CROCKETT, *Justice*: (dissenting).

I am unable to reach the same conclusions as to the facts, nor as to the application of law to them, as does the majority opinion. I do not see that there is any substantial disagreement among us as to the applicable principles of law: that foreign cor-

porations are not subject to the jurisdiction of the courts of this State unless they have a "business presence" here. This requires the engaging in business or activities to the extent of "at least certain minimum contacts" therein. This is not satisfied by contacts which are merely irregular or sporadic, but there must be some carrying on of the business in a manner which is to some degree systematic and continuous, so that it can fairly be said that the corporation has a business presence in the state such that the maintenance of the suit and the compelling of a defense therein does not offend against traditional notions of fair play and substantial justice.[1] As the main opinion correctly points out, this entails "more contacts . . . than sales and sales promotion within the state by independent nonexclusive sales representatives."

I am also in agreement with the statement of the main opinion that "these cases are strictly factual" and that they are to be determined by application of the law to the facts of the particular case. However, we should also keep in mind that our basic rule of appellate review requires us to accord to the trial court the prerogative of weighing the evidence and of drawing inferences therefrom, and upon that basis of determining the facts. It is the duty of this court to respect that prerogative: to look at the evidence and the inferences therefrom in the light favorable to sustaining the findings and judgment of the trial court, and not to the contrary for the purpose of overturning the findings and judgment as the main opinion impresses me as doing here.

On the basis of the pleadings, affidavits, answers to interrogatories and a plenary hearing, the trial judge made his findings and ruling in the form of a memorandum decision, extensively treating its view of the facts and the law, and which includes the following statements:

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[1] Footnote 3 of main opinion.

> In the case at bar, the plaintiff relies upon two visits to Utah by agents of defendant as constituting the "significant minimal contacts" to give this court jurisdiction under the statute and the due process clause. One was on March 31, 1969, which was before the effective date of the long-arm statute in question, and the other in January, 1970, upon which occasion defendant's agents were requested to come to Utah by plaintiff's agents without disclosing to defendant's agents, and intentionally so, that the purpose of the requested visit was to advise defendant that plaintiff would not use the Ryndam [defendant's ship] in 1970.
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> The "activities" of the March 31, 1969, meeting were at most, one part of the negotiations between the parties, and even if the Boston sailings were discussed at that meeting, in order for me to find that "obligations" were incurred or that a "claim" arose therefrom, it would require me to first find that a contract exists which is what plaintiff . . . denies.
>
> It is therefore, my conclusion that the activities of the defendant in this state were not sufficient to meet minimal requirements of the due process clause and the defendant's motion to quash the service of summons should be granted.

The case of International Shoe v. Washington[2] is the landmark authority in this field. As indicated in the majority opinion, that decision was based on the fact that the company employed resident salesmen in the state of Washington who had authority to conduct business and engage in activities in behalf of the company. It should also be noted that the decision was an affirmance of such determination by the Washington court, whose prerogative it was to find the facts, and not a reversal thereof on appeal, as is being done here.

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[2] Footnote 3 of main opinion.

In the recent case of Hill v. Zale Corporation,[2] 25 Utah 2d 357, 482 P.2d 332, we stated that the question of whether a foreign corporation is "doing business" within the state to subject it to the jurisdiction of our courts is to be determined from consideration of all of the relevant circumstances. That opinion pointed out a number of significant activities of the Zale Stores organization in Utah which distinguish it from the instant case. The Utah stores, though separate corporations, all did business under the name of Zale Stores, similar to the parent Texas corporation. The officers and directors, and the actual policy-making management, were practically identical. This was also true of the holding out to the public in advertising and in doing business; and of vital importance, the Utah stores did not have individual bank accounts, but the money was deposited to the credit of the Zale-Texas Corporation which controlled and disbursed it.

By way of contrast to the Zale case, in the instant one there is a considerably different fact situation. The defendant Holland-America Line has no stores or offices in Utah by the name, or at all. It has no employees or personnel here. The only outlet or contact with the public is through the travel agencies who are authorized to book its services along with similar services for other transportation companies. None of them serve Holland-America exclusively, but all book other transportation services generally. Each agency has a subagency appointment by agreement with the secretary of the Trans-Atlantic Passenger Steamship Conference. It permits the agency to book travel for its members in conformity with certain terms and procedures as determined for the most part by the Conference. The individual travel services, such as defendant Holland-America, arrange for distribution of their own literature, reservation rates, acceptances of reservations, and commissions to the agencies. Neither the travel services generally, nor this defendant, maintain separate

[2] Footnote 3 of main opinion.

offices, directory listings, or employ their own sales agents. Defendant's evidence also is that instead of being constant and regular, it has been somewhat inconsistent and separate in its advertising and contracts with the travel agencies in Utah.

It seems to me that fairness requires that this court keep the balance of justice true by applying the law in the same manner when it is to the disfavor of our courts and the disadvantage of our citizens as when it is to the contrary. This requires us to compare our own adjudication in Conn v. Whitmore[4] where we denied jurisdiction to the state of Illinois. There a similar problem was involved, but with the facts reversed. The plaintiff Conn was a resident of Illinois. Invoking their "long-arm" statute, he had served defendant Whitmore, a resident of Utah, and had obtained a judgment for which he was seeking full faith and credit in our Utah court. Whitmore challenged the Illinois court's jurisdiction and sought to defend on the merits here. Plaintiff Conn had solicited business (sale of horses) by mail in Utah. Whitmore had sent an agent to Illinois to look over the horses; had sent part of the purchase price in the mail, and had sent his agent who paid the balance and took delivery of the horses in Illinois. It is my opinion that there was at least as much "contact" by Whitmore in doing business in Illinois in that case as there is of Holland-America Line doing business in Utah in this one. Yet we held that this did not constitute the "transaction of business" by Whitmore in Illinois to give it jurisdiction within the meaning of is "long-arm" statute.

Based upon what has been said above, I am unable to see any justification for overturning the findings of our trial court, and would sustain his ruling.

ELLETT, *J.*, concurs in the dissenting opinion of CROCKETT, *J.*

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[4] Utah 2d 250, 342 P.2d 871 (1959).

APPENDIX B

UNITED STATES CONSTITUTION

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C

THE UTAH "LONG-ARM" STATUTE

Title 78-27-22 *et seq.*, Utah Code Annotated,
Laws of Utah 1969, Ch. 246, secs. 1-7.

78-27-22. *Jurisdiction over nonresidents — Purpose of act.* — It is declared, as a matter of legislative determination, that the public interest demands the state provide its citizens with an effective means of redress against nonresident persons, who through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection. This legislative action is deemed necessary because of technological progress which has subsantially increased the flow of commerce between the several states resulting in increased interaction between persons of this state and persons of other states.

The provisions of this act, to ensure maximum protection to citizens of this state, should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.

78-27-33. *Jurisdiction over nonresidents — Definitions.* — As used in this act:

(1) The words "any person" mean any individual, firm, company, association, or corporation.

(2) The words "transaction of business within this state" mean activities of a nonresident person, his agents, or representatives in this state which effect persons or businesses within the state of Utah.

78-27-24. *Jurisdiction over nonresidents — Acts submitting person to jurisdiction.* — Any person, notwithstanding section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:

(1) The transaction of any business within this state;

(2) Contracting to supply services or goods in this state;

(3) The causing of any injury within this state whether tortions or by breach of warranty;

(4) The ownership, use, or possession of any real estate situated in this state;

(5) Contracting to insure any person, property or risk located within this state at the time of contracting.

(6) With respect to actions of divorce and separate maintenance, the maintenance in this state of a matrimonial domicile at the time the claim arose or the commission in this state of the act giving rise to the claim.

78-27-25. *Jurisdiction over nonresidents — Service of process.* — Service of process on any party outside the state may be made pursuant to the applicable provisions of Rule 4 of the Utah Rules of Civil Procedure.

Service of summons and of a copy of the complaint, if any, may also be made upon any person located without this state by any individual over 21 years of age, not a party to the action, with the same force and effect as though the summons had been personally served within the state. No order of court is required. An affidavit of the server shall be filed with the court stating the

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time, manner and place of service. The court may consider the affidavit, or any other competent proofs, in determining whether proper service has been made.

Nothing contained in this act shall be construed to limit or affect the right to serve process in any other manner provided by law.

78-27-26. *Jurisdiction over nonresidents — Only claims arising from enumerated acts may be asserted.* — Only claims arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this act.

78-27-27. *Jurisdiction over nonresidents — Default judgments.* — No default shall be entered until the expiration of at least thirty days after service. A default judgment rendered on service may be set aside only on a showing which would be timely and sufficient to set aside a default judgment rendered on personal service within this state.

78-27-28. *Jurisdiction over nonresidents — When may be exercised.* — Subject to the applicable statute of limitations, jurisdiction established under this act shall be exercised regardless of when the claim arose.

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